



United States  
Department of  
Agriculture

Forest  
Service

Rocky Mountain Region

1617 Cole Boulevard  
Lakewood, CO 80401  
303-275-5350  
Fax: 303-275-5366

**File Code:** 6270  
(2018-FS-R2-05258-F)

**Date:** AUG 07 2018

Matthew Sandler  
Staff Attorney  
1536 Wynkoop Street, Suite 900  
Denver, Colorado 80202

Dear Mr. Sandler:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request dated July 20, 2018. Your request was received electronically by Marge Gallegos, the Regional FOIA Coordinator on July 23, 2018, and was assigned FOIA tracking number 2018-FS-R2-05258-F. The "RE:" block of your letter summarized the request as seeking:

*"All agency records regarding the proposed Village at Wolf Creek Access Project, the July 19, 2018 Draft Record of Decision, and anything else relating to this project or the agency action including internal and external communications, consultations with the U.S. Fish and Wildlife Service, contact with other agencies, contact with Leavell-McCombs Joint Venture and communications with any other entity."*

The main text of your letter stated the FOIA request as follows:

*"All agency records of the U.S. Forest Service ("FS") related to the proposed Village at Wolf Creek Access Project."*

In particular this request seeks any and all records regarding:

- *"The July 19, 2018 Draft Record of Decision;*
- *Canada lynx or any other listed or proposed species;*
- *Any consultations regarding this project;*
- *The proposed ANILCA access or the access alternative; and*
- *Any other records, communications with any entity, and information in any form regarding Wolf Creek pass, Access to LMJV's private parcel, or anything considered directly or indirectly by the agency specialist or Interdisciplinary Team topic."*

You requested a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). The FOIA request was submitted by you on behalf of three entities: Rocky Mountain Wild (RMW), San Luis Valley Ecosystem Council (SLVEC), and San Juan Citizens Alliance (SJCA). The information about these entities was limited to three sentences in your letter, so we are unable to make a determination on your request for fee waiver. We believe that you are aware of the United States Department of



Agriculture (USDA) regulation regarding FOIA fees at 7 C.F.R. Appendix A to Subpart A of Part 1. That regulation includes a discussion of FOIA fee waiver requests submitted to USDA agencies such as the Forest Service. The regulation includes six factors that the agency uses to evaluate fee waiver requests. These six factors are summarized and discussed on the Forest Service web page related to FOIA at this link: <https://www.fs.fed.us/im/foia/feefactors.htm>.

Before we proceed further, we request that you provide information that you believe justifies a fee waiver, as related to each and all of the six criteria. We also request that you provide this information for each of the three entities seeking the waiver. We further request that you provide this information in a manner that would allow us to evaluate whether each of the three entities, individually, qualifies for the fee waiver. We are particularly interested in learning how the subject records would contribute to the public's understanding of government operations. Perhaps more specifically, we are interested in learning how the records can be viewed as contributing to an understanding by the general public, as contrasted with contributing to the requesters' role as litigants in ongoing litigation. Federal agencies may not begin to process FOIA requests until any issues associated with fee waivers are resolved. Beyond your request for fee waiver, there are a few points related to your FOIA request that we would like to draw to your attention.

I. The documents relied upon to develop the July 19, 2018, Draft Record of Decision have been made available to the public at: <https://www.fs.usda.gov/project/?project=35945>.

When you are at this link, you can access the project records by clicking on the "Decision" button under the title "Project Documents." After that step, you should be able to click on a link titled: 20180719\_VWC\_Alt3.

This step should open a folder to show the following documents:

- [20180719\\_Draft ROD and BA\\_VWC\\_Alt3](#) (PDF 3423kb) **07-19-2018;**
- [20180719\\_final legal notice wcv access project alternative 3](#) (PDF 80kb) **07-19-2018;**
- [20180719\\_nr\\_VWC\\_DROD](#) (PDF 71kb) **07-19-2018;**
- [20180719\\_VWC\\_Alt3\\_Interested\\_Party](#) (PDF 185kb) **07-19-2018;**
- [20180719\\_VWC\\_Alt3\\_SIR](#) (PDF 4084kb) **07-23-2018.**

We would exclude from the scope of your request any records that have been made available to the public through Internet links or through other mechanisms.

II. Confirmation of the timeframe for the FOIA request needs to be discussed. The last item that you requested was *"any other records, communications with any entity, and information in any form regarding Wolf Creek pass, Access to LMJV's private parcel, or anything considered directly or indirectly by the agency specialist or Interdisciplinary Team topic."* Because this item covers communications with external entities, we understand the timeframe for this item to be from November 20, 2014, through July 20, 2018.



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The remaining items in your request are tied to the July 19, 2018, Draft Record of Decision. The process of developing that document began on February 8, 2018. As a result, the timeframe for a search for records for the remaining four items would be February 8, 2018 through July 20, 2018.

You will notice that we have identified July 20, 2018, as the end date for the search for records. Here, the FOIA request involves many custodians and an ongoing matter. There may be new records, usually in the form of emails, being created each day. In order to manage this type of search and records production activity, the agency must set a specific end date for the search. We are linking the end date for the search to the date of your FOIA request.

**III.** The Village at Wolf Creek access issues is subject to current litigation. The cases are: Rocky Mountain Wild, et al. v. Dallas, et al. 15-cv-01342-RPM (District of Colorado) and Rocky Mountain Wild, et al. v. Dallas, et al. 17-1366, 17-1408, 17-1413 (Tenth Circuit Court of Appeals). You and your clients are involved in these ongoing cases. The United States was a party to the litigation until May 14, 2018. We understand your FOIA request to *not* include any communications within, among, and between the Forest Service, USDA's Office of the General Counsel (OGC) and the U.S. Department of Justice (DOJ) as related to these cases. Any such communications would be within the attorney-client privilege. The RMW, SLVEC, and SJCA could not reasonably expect to receive such records in response to a FOIA request. If the RMW, SLVEC, and SJCA pursued such a request, the most that these requesters could expect to receive at the end of the request, or administrative appeal, or any litigation on the subject would be a large privilege log of records covered by the attorney-client privilege. Consequently, if the requesters *do* in fact seek these records, the requesters are not likely to qualify for a fee waiver.

We request that you acknowledge that the complexity of your FOIA request constitutes *unusual circumstances* as stated at 7 C.F.R. § 1.16(b) as well as *exceptional circumstances* as listed at 5 U.S.C. § 552(a)(6)(C).

If you have any questions regarding this letter, please contact Marge Gallegos at 303-275-5149 or [r2\\_ro\\_e-foia@fs.fed.us](mailto:r2_ro_e-foia@fs.fed.us).

If you need any further assistance or would like to discuss any aspect of your request please do not hesitate to contact the FOIA Public Liaison at 202-205-1542. Additionally, you may contact the Office of Government Information Services (OGIS) National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland, 20740-6001, email [ogis@nara.gov](mailto:ogis@nara.gov); telephone 202-741-5770 or toll free 877-684-6448; or fax 202-741-5769.

Sincerely,



*for*  
BRIAN FEREBEE  
Regional Forester

cc: Dan Dallas, Guy Blackwolf, Marge Gallegos